BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD E. BEUS	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,019,145
GENERAL AIR, INC.	)	& 1,019,147
Respondent	)	
AND	)	
	)	
UNITED FIRE & CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the November 10, 2004 preliminary hearing Order of Administrative Law Judge Bruce E. Moore. Claimant was granted benefits after the Administrative Law Judge (ALJ) determined that claimant's slip and fall while walking across the street from the employer's job site to his employer's premises constituted an accident arising out of and in the course of employment, even though it occurred while claimant was on a paid break.

Respondent contends that the going and coming rule applies and claimant was not in his employer's employment at the time of the accident, thereby negating any right to benefits. Additionally, respondent contends that claimant's condition preexisted the fall and that the fall had no effect on claimant's ongoing symptoms or the treatment being recommended by the various health care providers to whom claimant had been going for many years. Respondent further argues that claimant's current pain and symptoms are the natural consequence of his preexisting condition, with no immediate aggravation from the fall of March 4, 2003.

While claimant initially alleged, in Docket No. 1,019,147, a series of accidents through August 3, 2004, at the preliminary hearing, claimant's attorney acknowledged that the series of injuries claim was not being actively pursued and could be withdrawn for the time being.[1]

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[1] P.H. Trans. at 21.

ISSUES

Did claimant's accidental injury arise out of and in the course of his employment or is claimant's current condition the natural consequence of his preexisting condition, with no work-related aggravation?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant, an electrician, began working for respondent in the fall of 2002. Claimant acknowledges a long history of left knee, hip and foot pain, with claimant having received cortisone injections for as many as 15 years prior to the March 4, 2003 slip and fall.

On the morning of March 4, 2003, claimant was working at the Stiefel Theatre project, one of respondent's work projects, when claimant and some of his coworkers decided to go for a break. The breaks generally occurred at the General Air shop, which was across the street from the theatre project. Claimant testified that occasionally messages would be left for claimant or other employees at the shop and the employees would also, at times, pick up at the shop deliveries from UPS or other vendors. However, on the date of accident, claimant acknowledged he received no messages and he picked up no deliveries from any vendors while at the shop. He simply stated that as he was crossing the street while returning from the shop to the theatre, he slipped on the ice, falling, damaging a tooth and injuring his left hip. After advising respondent of the fall, he went to Bruce Johnson, D.D.S., in Salina, Kansas. He also went to his local chiropractor at Hancock Chiropractic Clinic (to whom he had been going for some time) for the bruised left hip injury. The chiropractic treatments were billed to respondent's workers compensation carrier.

Claimant testified that the only thing he was carrying at the time of the fall was some paperwork connected to a job, but it is not explained in the record whether claimant had that paperwork when he went to the shop or whether it was something he picked up at the shop.

The chiropractic treatments proved little or no help, and claimant returned to his family doctor, Jeffrey S. Ehrlick, M.D., who ultimately referred him to Eustaquio Abay, II, M.D., a neurosurgeon in Wichita, Kansas. Dr. Abay referred claimant for an MRI, which revealed degeneration of the lumbar spine; radiculitis to the left; spinal stenosis at L4-5 and L5-S1, greater at the L4-5 level; and spondylolysis of the lumbar spine without myelopathy.

Disc dessication was evident at the lower lumbar region, with a mild bulging of the disc at L3-4, indicating minimal impingement on the anterior thecal sac; a broad-based disc bulge at L4-5 with joint hypertrophic changes, greater left side than right; bilateral neural foraminal narrowing and nerve root impingement; and a broad-based concentric bulge of the disc and facet joint hypertrophic changes at L5-S1, again with narrowing of the neural foramina, left greater than the right, with left nerve root impingement.

This MRI, which was performed on April 30, 2004, was the first time claimant was able to successfully undergo an MRI. There had been at least two prior attempts to perform an MRI on claimant, even before the March 4, 2003 fall, with claimant being unable to undergo the procedure due to claustrophobia. Claimant acknowledged he was only able to complete the April 30 MRI after they knocked him out with drugs.

Claimant, in his testimony, was very up front about his preexisting condition and the fact that he had had multiple epidural cortisone injections prior to the March 4 fall. However, claimant testified that the injections after the March 4 fall were unsuccessful in alleviating his symptoms. Before the fall, the cortisone injections had always been successful in, at least, reducing his pain for a period of from several months to up to two years. Claimant also testified that while most of the symptoms present after the March 4 fall were present beforehand, the incidence of numbness in the "two little toes"[2] on his left foot was a new symptom. The Board is aware of the multitude of medical records provided which show claimant time and again not mentioning the fall. When asked about this, claimant testified that it was his understanding that respondent discouraged workers compensation claims and so when he went to Dr. Abay, he did not turn it in on workers compensation, but rather on his Blue Cross/Blue Shield health insurance. He also advised the workers compensation representative from respondent, at the close of the file, that he felt he would "get over it with time."[3] Unfortunately, this was not the case.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[4]

Respondent argues that because claimant was on break when the accident occurred and not on the employer's premises, the injury is non-compensable. Respondent further argues that the going and coming rule under K.S.A. 2002 Supp. 44-508(f) applies in that claimant was on break.

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[2] P.H. Trans. at 16 and 36.

[3] P.H. Trans. at 38-39.

[4] K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

The Board has applied the "going and coming" rule, as well as the premises exception to that rule, when analyzing lunch break injuries and whether they are or are not compensable. However, the case at bar does not involve a lunch break. The duration of lunch breaks is generally long enough to allow employees to leave the premises and be out of their employers' control. Larson's and most jurisdictions analyze lunch break cases using the "going and coming" rule and the premises exception to that rule.[5] But injuries suffered during shorter coffee or rest breaks are generally treated differently. The Board has, likewise, employed a different analysis for breaks than for injuries suffered during a lunch break.[6] Larson's notes that many jurisdictions find that the duration of a coffee or rest break is so short that the employment relationship is not interrupted. Therefore, injuries occurring during those breaks are compensable as work related. A general rule from Larson's regarding off-premises coffee or rest breaks is:

> If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment.[7]

Further, Larson's notes that "[i]f the employees during the coffee break are expected to go to a particular off-premises place, the element of continued control is adequately supplied."[8] In this instance, claimant testified that it was common for the employees to go to the employer's shop, which is across the street from the theatre where they were working. While it was not the case on this occasion, the shop was used as a place to provide messages and a place to pick up supplies from the various vendors dealing with respondent. The Board finds the control maintained by the employer during this period to be sufficient to cause claimant's fall in the middle of an icy street, between the shop and the theatre, to have arisen out of and in the course of claimant's employment with respondent.

The Board must next consider whether claimant's condition was, in any way, aggravated by the fall. It is acknowledged the record contains numerous entries dealing with claimant's preexisting problems with his low back, left hip, left leg and foot. However,

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[5] *1 Larson's Workers' Compensation Law*, § 13.05[4] (2004).

[6] *See Vaughn v. City of Wichita*, No. 184,562, 1998 WL 100158 (Kan. WCAB Feb. 17, 1998); *Timmons v. Western Resources*, No. 227,781, 1997 WL 802911 (Kan. WCAB Dec. 30, 1997).

[7] *1 Larson's Workers' Compensation Law*, § 13.05[4] (2004) at 13-62.

[8] *1 Larson's Workers' Compensation Law*, § 13.05[4] (2004) at 13-64.

"[a]n accidental injury is compensable even where the accident serves only to aggravate a preexisting condition."[9]

In this instance, claimant has testified that while his current condition is almost identical to his preexisting condition, there are two differences resulting from the March 4 fall. First, claimant's preexisting problems were generally resolved, although temporarily, with cortisone injections. After the March 4 fall, the cortisone injections no longer had that desired effect. Additionally, claimant testified the numbness in his toes did not occur until after the March 4 fall. This new symptom indicates that claimant's condition was, at the very least, aggravated by this fall. Whether this aggravation is temporary or permanent, or the extent of that aggravation, is not to be determined at this time. Suffice it to say that the evidence indicates that the fall of March 4, 2003, aggravated claimant's preexisting condition.

The Workers Compensation Act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the Act to provide the protections of the Workers Compensation Act to both.[10] The Board finds based upon this record, that claimant has proven that he suffered an aggravation of his preexisting condition and the determination by the ALJ that claimant is entitled to benefits as a result of the March 4, 2003 slip and fall should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated November 10, 2004, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 2005.

BOARD MEMBER

c: Scott M. Price, Attorney for Claimant
James B. Biggs, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[9] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971); *see also Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

[10] K.S.A. 44-501(g).